Chapter 14: Administrative Law

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Without doubt the most significant development in this field during the survey year, and, in fact, one of the most significant developments in the history of this subject in Massachusetts, was the adoption of the Administrative Procedure Act in the closing days of the legislative session in June, 1954. After a detailed examination of this act, attention will be given to other recent legislation and new decisions of interest in the field.

A word might be said in the first volume of the Annual Survey in regard to the general coverage of this chapter. It will be limited to what has been called "general" administrative law, that is, the basic principles and theories of law applicable to administrative agencies as a class. On the federal level this may not be needed as a stated premise, but on the state level it is essential to an examination of the subject.

It should be noted that more specialized treatment is given to various "administrative law" matters in regard to particular agencies in other chapters of this volume. Such treatment is given, for example, to the State Department of Public Utilities, the Department of Insurance and Banking, the Industrial Accident Board, the Departments of Public Health, Mental Health, and Public Welfare, and the Department of Corporations and Taxation.

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Professors Sacks and Curran were the draftsmen of the Massachusetts Administrative Procedure Act adopted by the General Court in 1954 and discussed in this chapter.

See Parker, Administrative Law 5 (1951).
With this form of coverage, partly general, partly specialized, it is hoped that an adequate picture of the field of Massachusetts administrative law will be given.

A. STATE ADMINISTRATIVE PROCEDURE ACT

§14.1. Background. On June 10, 1954, Governor Herter signed into law the State Administrative Procedure Act, which creates a new chapter in the General Laws, Chapter 30A.1 It is applicable to all state administrative agencies with a limited number of specified exceptions.2 The act seeks to establish minimum standards of fair administrative procedure and thereby to achieve a certain degree of uniformity, particularly in standards for judicial review.

The act in its original draft was prepared at the Harvard Law School upon the request of Governor Herter. A study group headed by the authors of this chapter was formed early in May, 1953, and after a year of research and consultation the bill was presented to the legislature accompanied by a special message from the Governor urging its passage.3

The Administrative Procedure Act (hereafter referred to as the APA) will not go into effect until July 1, 1955. The delayed effective date was adopted in order to allow the state agencies time to revamp present practices and procedures which may not be in conformity with the act, and also to give the agencies and other interested groups a year's time in which to discover any "bugs" in the rather lengthy act and to correct them before it goes into effect.4 While deficiencies in a statute as complex as this one will surely be found, it is questionable whether many will come to light before the provisions go into effect and are actually applied to concrete situations. At the same time, Section 9 of the APA requires agencies to adopt regulations governing the procedures prescribed by the act, and defects may become apparent in this process. It is also to be hoped that members of the bar will familiarize themselves with the provisions and subject them to critical study.

The adoption of an administrative procedure act generally applicable throughout a jurisdiction is no longer a novelty. The task of drafting the Massachusetts act was considerably eased by the availability

2 For a listing of the exceptions, see Section 14.2 infra.
3 House No. 2766 (1954).
4 It should also be noted that three sections of the original bill relating to judicial review by means of extraordinary remedies were not reported to the floor by the Judiciary Committee studying the bill. The committee recommended further study, and the General Court passed an order providing that the Judiciary Committee study these provisions and their effect on local administrative agencies, and report to the next General Court. The order included a general authorization to study those portions of the original bill which did pass, thus effectively giving the committee the entire bill for study. See House No. 2976; Journal of the Senate, June 9, 1954, pp. 1205, 1206.
of a sizable amount of existing legislation throughout the country and the growing body of case law in the field. The Federal APA\(^5\) and the Model State APA\(^6\) prepared by the Commissioners on Uniform State Laws were particularly helpful in the preparation of the act. Of course, words and ideas were culled from many places and molded to the peculiarities of Massachusetts law and practice. Extensive consultations were held at all stages with state agencies, bar associations, and other interested groups and persons in the state.\(^7\) The result is an act similar in its framework to the administrative procedure legislation now in effect on the federal level and in various states, but adapted in many important respects to Massachusetts practice.

**§14.2.** Scope of the act. The APA can, after the definitions (Section 1), be divided into three parts: Sections 2 to 9 relate to regulations; Sections 10 to 13 concern the conduct of adjudicatory proceedings; and Sections 14 to 16 deal with judicial review.

The act applies to all state agencies exercising administrative functions except the following: those in the legislative and judicial branches, the military and naval boards, the penal agencies, the Division of Child Guardianship in the Department of Welfare, and the Division of Industrial Accidents in the Department of Labor and Industries.\(^1\) All of these except the last were exempted in the original draft. The last was added by the Judiciary Committee because it felt that the Division and its integral part, the Industrial Accident Board, are genuinely unique.\(^2\) While the scope of the act is very much affected by the definitions of "regulation" and "adjudicatory proceeding" in Section 1, discussion of these definitions is included in the parts of this chapter dealing with those matters.

### B. Regulations

**§14.3.** "Regulation" defined. The definition of the term "regulation" is new to Massachusetts law, although such a definition is common in procedure acts. The term is broadly defined in Section 1(5) to include "the whole or any part of every rule,\(^1\) regulation, standard or

\(^6\) Proceedings of the National Conference of Commissioners on Uniform State Laws 83 (1943).
\(^7\) A general outline of the way in which the original draft was prepared is given by one of the authors in Sacks, A Proposed Administrative Procedure Act for Massachusetts, Harvard Law School Bull. 5 (June, 1954).

\(^1\) G.L., c. 30A, §1(2).
\(^2\) A previous study of administrative procedure in Massachusetts recommended that any uniform procedure for judicial review not be applied to the Workmen's Compensation Act. See House No. 1440, Report of the Special Commission on the Establishment of an Administrative Court 17 (1943).

\(^1\) The term "regulation" is used to include the term "rule" in contrast with the Federal APA, which uses the term "rule" as all-inclusive. The two terms have been used interchangeably in administrative law, and there is little to dictate a choice between them, except that "regulation" seems somewhat more familiar to nonlawyers.
other requirement of general application and future effect adopted by an agency to implement or interpret the law enforced or administered by it." The breadth of the definition is intended to make it clear that letters or bulletins issued by agencies may be included even though they are not entitled regulations. Thus, state letters or circular letters used in the past by some agencies are covered unless they come within a specific exclusion.

One of the most important specific exclusions is the advisory ruling, defined in Section 8 of the act. Section 8 expressly authorizes a practice, which has never been questioned, whereby agencies informally advise requesting persons of the effect upon them of the statutes and regulations administered by the agency. Since "regulation" is defined to include "interpretive" as well as "legislative" regulations, and since informal advisory rulings may at times have as great an effect as formal interpretive regulations, it may be difficult in theory to justify the distinction. As a practical matter, however, it is impossible to impose procedural restraints on the process whereby agency personnel issue thousands of informal rulings a year over the telephone, by mail, and in informal conversations.

Also excluded from the definition, and therefore from the coverage of the act, are those regulations which concern only the internal management of the agency itself and those which concern only other state agencies. This exclusion is quite common and is not new to Massachusetts administrative law. The same class of regulations, at least as regards internal management of the agency itself, is excluded from the requirement that regulations must be filed with the State Secretary before becoming effective. This has been a requirement of law in Massachusetts since 1918.

Also excluded are regulations concerning the operation of the state's penal, educational, health, and welfare institutions. This is a class of regulations similar to those on internal management.

Regulations concerning public works such as streets and highways, where their effect is indicated to the public on signs and signals, are likewise excluded.

A final exclusion consists of regulations relating to the development and management of property held in the name of the Commonwealth or of the agency itself. This exclusion is based upon the view that such regulations, while they may affect the public, are primarily managerial rather than regulatory. It may be that, with respect to some of the activities of the Department of Public Works, the exclusion is too

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8 The Massachusetts APA also differs from the federal act in that it limits the definition of regulation to standards of general applicability, whereas the federal act includes standards of "particular" applicability. Use of this language in the federal act is quite confusing, since it encompasses situations that are clearly adjudicatory in character.

9 The same general provisions can be found both in the Federal APA (§5(d)), and in the Model State APA (§7).

4 Model State APA §1(2).

broad, but it is difficult to draw a line in any other manner. One important effect of this exclusion is that regulations issued by various state authorities, such as the Mystic River Bridge Authority, are not covered.

§14.4. Procedures for adoption, amendment, or repeal of regulations. Prior to passage of the Massachusetts APA, the procedure for taking action with respect to regulations was in a state of considerable confusion. The General Court had, through separate statutory enactments over a period of many years, conferred on numerous agencies the power to issue regulations. Many of these statutes prescribed no requirements of procedure, others simply provided for "notice and hearing," while still others were more elaborate, but highly diverse one from another.¹

In 1951, an effort was made to create a uniform minimum standard for the adoption of rules and regulations, through enactment of Section 37A of Chapter 30 of the General Laws.² This section provided for notice and public hearing as to all regulations to be observed, under "penalties" for the violation thereof. There were three important deficiencies in this provision: (1) the ambiguity of the term "penalties" created confusion as to its scope; (2) no procedure was provided for cases where "penalties" were not imposed; (3) the notice and hearing requirements involved a minimum of six weeks' delay in the issuance of any regulation, with no provision for emergency regulations to meet emergency situations.

The aim of the APA in prescribing a procedure for issuance of regulations is twofold. First, it seeks to establish a procedure which can adequately serve as a general standard to be followed in most cases. To accomplish this end, the deficiencies of Section 37A had to be eliminated.³ Second, it contemplates and provides for variations from the standard procedure in particular instances. For example, the 21-day notice period may in some cases be deemed too short, and in others perhaps too long. Also, while a general procedure act cannot specify in what cities and towns newspaper notice shall be published, a statute relating to a particular agency may do so.

In future enactments, if the General Court confers power to issue regulations without specifying any particular mode of procedure, the standard procedure prescribed by the APA will govern. On the other hand, if the legislature determines that some special procedure is called for, it can accomplish its purpose by enacting specific provisions setting forth the special procedure. The pattern for statutes now on the books is the same. Where no procedure is prescribed, the standard

¹ For an examination of some of these provisions, see Segal, Administrative Procedure in Massachusetts: Rule Making and Judicial Review, 33 B.U.L. Rev. 1 (1953).
³ Section 37A is repealed, two specific references to it in the General Laws are changed to refer to Section 2 of the APA, and it is provided that any other reference to Section 37A in the General Laws "shall be deemed to refer" to Section 2 of the APA. See Acts of 1954, c. 681, §§2, 3, 8.
governs. Where, however, special provisions have been enacted, they remain in effect. In this connection, the draftsmen of the APA were well aware that, while some of the special procedures now in effect were justified, others were simply fortuitous. It was impossible, in the time available, to classify all special procedures, and therefore no effort was made to repeal any of them. It is hoped that an effort will be made in the future to repeal provisions for special procedures which are not demonstrably necessary.

The standard procedure for issuance of regulations is prescribed in Sections 2 and 3 of the APA. Section 2 sets forth the procedure for adoption or amendment of (1) any regulation as to which another statute requires a hearing, and (2) any regulation, except one governing agency practice, the violation of which is punishable by fine or imprisonment. Section 3 gives the procedure for adoption or amendment of all other regulations as well as the repeal of all types of regulations.

The principal difference between the two sections is that Section 2 requires that the agency hold a public hearing before it takes action, whereas Section 3 requires only that the agency afford interested persons an opportunity to be heard, either orally or in writing. The aim of both provisions is fairly obvious, namely, that before agencies promulgate regulations, they receive and consider the views of persons who may be affected by the regulations. A public hearing requirement is most likely to accomplish this aim, but at the same time there are a substantial number of regulations so minor in character that a rigid public hearing requirement would often be too cumbersome and expensive for the results obtained. The APA, therefore, steers a middle course, requiring the hearing only for those types of regulations most likely to be important. Agencies may, of course, hold public hearings prior to taking action even in those cases where the APA does not require it, just as they have often done in the past.

The hearing procedure provided in Section 2 is left completely flexible. The APA imposes none of the formalities required in adjudicatory proceedings, which are discussed later in this chapter. Specific procedural requirements may, however, be imposed by other statutory enactments of the legislature or by the courts.

The requirements that agencies give notice of their proposed actions are substantially similar in Sections 2 and 3. At least 21 days prior to the public hearing or the proposed agency action, as the case may be, the agency must publish notice in one or more newspapers. It is also authorized to publish the notice in a trade or professional publication, where appropriate. Such authority seems desirable, since newspaper notice is so often an ineffective means of reaching the groups to be affected by the regulation.

The APA provides for an additional, fairly novel form of notice.

4 Thus G.L., c. 175, §113B imposes quite strict requirements of procedure for the conduct of the hearing on the establishment of compulsory automobile liability insurance rates.

http://lawdigitalcommons.bc.edu/asml/vol1954/iss1/20
Each agency is required to give personal notice, by mail or otherwise, to all persons who place their names on a list at the agency to receive such notice. Experience shows that a relatively small number of persons or groups have sufficient interest in the regulations of each agency to present their views concerning proposed agency action. It is hoped that this "list" method of notice will afford such persons a guarantee of timely notice. To insure that the list remains current, the act requires that each person renew his listing annually, each December.

Because speed in the adoption or amendment of regulations may at times be essential, both sections contain "emergency" provisions allowing deviation from the prescribed procedures. Under Section 2 a regulation may be issued immediately if the agency finds that such action "is necessary for the preservation of the public health, safety, or general welfare." The finding and a statement of the reasons for it must be filed with the regulation in the State Secretary's office. The emergency regulation goes into effect immediately, but for not longer than three months. If the agency desires to continue the regulation in effect beyond that period, it must comply with the normal requirements of notice and public hearing specified in the section. This would appear to constitute an adequate safeguard against abuse.

Section 3 contains a less restrictive escape clause. The agency may dispense with the requirements of the section and may immediately issue a regulation to go into effect indefinitely if it finds that compliance with the requirements would be "unnecessary, impracticable, or contrary to the public interest." As with Section 2, this finding and the supporting reasons must be filed with the State Secretary.

The escape clause of Section 3 may at first glance appear to be unduly liberal, in that the standard is broader than that in Section 2 and the three-month limitation on effectiveness is omitted. In fact, this type of provision is quite common in administrative procedure acts, and is contained in substance in both the Federal APA and the Model Act. It is intended to allow for regulations which are of such routine and noncontroversial a character that even the machinery for notice and opportunity to present views is too cumbersome. While there is a possibility that some agency officials may abuse this escape provision, such action would be subject to discovery in the State Secretary's office. Should abuses prove to be widespread, a corrective amendment of Section 3 can be undertaken.

No effort is made in Sections 2 and 3 to change the present laws which require that regulations be approved by specified persons or groups before they may go into effect. The Massachusetts statutes

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* This procedure is embodied in the administrative procedure act of California. Cal. Gov. Code Ann. §11423 (Deering, 1951). The extent to which it will be utilized will probably depend on the degree to which it becomes known and understood. See Heady, Administrative Procedure in the States 27, 28 (1952).

* §4(a).

* §2(5).
contain many such provisions. A very common feature is the require-
ment of approval by the Governor and Council. While these pro-
visions have been the subject of criticism, and it may be conceded
that approval by the Governor and Council is in many instances simply
a formality, the APA does not afford a good vehicle for change in this
area. Uniform repeal of all approval requirements seems unwise, since
there may well be situations in which approval serves a useful purpose.
The only alternative is a statute-by-statute re-evaluation, resulting in
repeal of some approval provisions and a shift in responsibility for
approval in other instances. This would not appear to be an appro-
priate function of a general administrative procedure act.

§14.5. Petitions to adopt, amend, or revoke regulations. Under
Section 4 of the APA any person can petition an agency to adopt,
amend, or revoke a regulation. The agency must set up a procedure by
regulation to consider these petitions, although it need not grant the
petitions, since its action on them is purely discretionary. This section
may help to make the emergency clause in Section 3 work effectively,
since under Section 4 interested persons can petition an agency for an
opportunity to be heard after a regulation has been issued.

§14.6. Compilation and publication of regulations. The pro-
position that agency regulations should be compiled and published in a
form available to the public is not seriously disputed, and has not been,
at least since the "Hot Oil" case decided by the United States Supreme
Court in 1935. The fairness of such a requirement is obvious. Most
agencies, though they would like to be able to compile and publish
their regulations in order to enhance their enforcement programs, have
not been able to do so because of a lack of funds.

Many of those who have studied the situation have felt that the
only satisfactory solution lies in a system of the federal type, with a
register and a code of regulations centrally compiled, published, and
distributed. The Massachusetts APA does not go this far, reflecting
the view that a less elaborate and less expensive approach should first
be tried. While the Federal Register and the Code of Federal
Regulations have been highly successful, the worth of such publications at the
state level remains open to conjecture. Very few states have provided
for complete registers and codes, and a study by Professor Heady of the
situation in California, which has so provided, suggests some doubts as
to whether the expense is justified by the utility of the compilation.

See, for example, the recommendations of the Special Commission on the Struc-
ture of the State Government in regard to personnel administration. In some
instances it recommends that the function of approval be shifted from the Governor
and Council to another agency, in others that it be exercised by the Governor and
Council as well as another agency, and, in still others, that concurrent approval be
eliminated. See House No. 2352, Fourteenth Report, Personnel Administration 23-
30 (1953).

§14.6. 1 Panama Refining Co. v. Ryan, 293 U.S. 388, 55 Sup. Ct. 241, 79 L. Ed. 446
(1935). See an account of the background of the case in Jaffe, Cases and Materials on
Administrative Law 25, 26 (1935).

Most persons (including lawyers) do not want and will not use a complete code, but rather have need for the regulations issued by a few specific agencies. And it is likely that only the law libraries and a few large law firms would be willing to pay what a complete code would cost.

The more modest solution of Section 6 of the Massachusetts APA places responsibility directly upon each agency to compile all of its regulations currently in effect and to publish them, in any appropriate form it may select, for distribution to any interested person upon request. This must be accomplished by July 1, 1956, within one year of the time the act goes into effect. Thereafter, the agency must keep its publication currently up to date in any practicable manner, as by loose-leaf pages, or page inserts. The agency may also include in its publication an informal description of its organization and procedures and any other explanatory information it deems useful to aid the public in dealing with the agency.

It is to be hoped that Section 6 will ease the budgetary problem of the agencies, so far as publication of regulations is concerned. Of course, the very fact of a legislative mandate to compile and publish will greatly aid the agencies in their requests for funds. In addition, they are authorized to publish in any form they consider practicable, and to charge not more than cost for copies of the publication distributed upon request. Both of these provisions should keep expenses at a minimum.

Finally, an effort is made to insure that Section 6 will be carried out by establishing centralized responsibility for its proper administration in the State Secretary. He is required to report on the compliance of the agencies annually to the General Court, and in particular cases of noncompliance, to the Governor and Council. For these purposes, agencies are required to file with the Secretary copies of their publications and any other pertinent information he may request. While these are obviously not severe sanctions, it remains to be seen whether agencies will resist publication of their regulations. Such resistance seems by no means likely at present. Should it develop, then perhaps a more expensive system of centralized publication will have to be considered.

§14.7. Filing of regulations and court review. There are two other provisions in the act relating to regulations which should be mentioned. Both restate previous law. These are Section 5, covering the requirement of filing regulations with the State Secretary before they become effective,1 and Section 7, which provides a cross reference to Chapter 231A of the General Laws, the Declaratory Judgments Act, under which court review of regulations may be obtained.


§14.7. 1 The requirements are specified in G.L., c. 30, §37.
§14.9. **ADJUDICATORY PROCEEDINGS**

**§14.8. "Adjudicatory proceedings" defined.** The APA imposes a considerable number of procedural requirements upon the conduct of "adjudicatory proceedings," and the definition of this term in Section 1(1) is therefore quite important. While it is intended in a general way to refer to hearings of a quasi-judicial character, two important elements are included in the definition. First, the term is limited to proceedings which may affect specifically named persons. Therefore, rate hearings for an entire industry rather than for one or more named companies—for example, compulsory automobile liability insurance rate hearings—are not included in the definition. Second, with one important exception discussed in the next section, the term is limited to hearings which are required either by some other statutory provision or under the federal or state constitutions. This second limitation is the same as under the Model Act. While the Federal APA refers only to hearings required by statute, the United States Supreme Court in the *Wong Yang Sung* case broadly construed the act to encompass all hearings required by the Constitution.

**§14.9. Licensure: Revocation, suspension, or refusal to renew.** As has just been noted, the Massachusetts APA generally accepts without modification the legislature's determination, as expressed in other statutory provisions, that a hearing be afforded. In one significant area, however, a change has been made.

There are many statutes relating to revocation, suspension, and renewal of licenses by state agencies. Many such statutes expressly require notice and hearing; a few expressly provide that no hearing need be held; and still others contain no provision either way. It is this last category which has caused great difficulty. The courts have had to interpret legislative purpose with little to guide them, and have resorted to fairly refined distinctions. In the background lurk distinctions between "rights" and "privileges," and "mere personal privi-

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1 The term is a new one in administrative procedure acts for a generally known and accepted concept. The Model Act uses the term "contested case." §1(3). The Federal APA uses the term "adjudication" but defines it in terms of what is not "rule making." §2(d).

2 Four exclusions from the definition of "adjudicatory proceeding" are set forth in Section 1(1): (a) proceedings to determine whether the agency should institute or recommend court proceeding; (b) arbitration of labor disputes voluntarily submitted; (c) hearings on state employee grievances; (d) classification or allocation of appointive state offices or positions.

While it was not entirely clear that all of these procedures were covered by the definition, they were excluded as a matter of caution.


4 For a full, though not complete, list of statutes relating to business licenses, see MacCormack, Notice and Hearing Before Administrative Revocation of Business Licenses in Massachusetts, 27 B.U.L. Rev. 125 (1947).
Section 13 of the APA is based upon the view that, as a general matter, a licensee should not lose his license without notice and hearing. Thus, except where the legislature has expressly provided that administrative action may be taken without a hearing, or in other specifically limited situations, Section 13 provides for such hearing. In the case of revocation or refusal to renew the license, it provides for a prior hearing. Suspension presents more difficult problems. While many statutes provide for hearings prior to suspension, there are situations where immediate suspension may be necessary to safeguard the public against a possibly dangerous or untrustworthy licensee. Therefore, Section 13 lays down the minimum requirement that a suspended licensee be afforded a hearing promptly after suspension.

In this way, perhaps a happy medium can be found between necessary protection of the public and fair treatment of the licensee. It should be noted, however, that Section 13 applies to state agencies, and not to those in the municipalities, whereas the problem described here is far more serious at the local than at the state level. It may well be that a provision similar to Section 13 should be enacted for local administrative agencies, although that would go beyond the scope of the APA.

§14.10. Preliminary matters in adjudicatory proceedings. The second major portion of the APA begins with Section 10, relating to preliminary matters in the conduct of adjudicatory proceedings. It is an extremely important section, since these preliminary questions often determine the scope of the inquiry and whether or not the provisions of the act relate to the particular hearing at all.

First of all, the section makes it clear that the agency and the parties are still free to make an informal disposition of any matter covered by the requirements of the act in regard to adjudicatory proceedings. This may be done by stipulation, settlement, consent order, or default. The agency and the parties may also by agreement limit the issues to be heard, or vary the procedures required by the APA.

The agency is also given authority to place upon any party the responsibility to request a hearing if he is given notice of his rights in this regard.

§14.11. Parties and intervention in adjudicatory proceedings. The various procedural safeguards set forth for the conduct of adjudicatory proceedings...
proceedings in Section 11 are expressed in terms of the rights of "parties" to the proceeding. The term "party" is defined in Section 1(3) of the APA. This definition was not included in the original bill on the theory that the question was best handled by case-to-case adjudication in the courts. The definition was added in committee largely because of apprehension on the part of some agencies and private groups that lack of a definition would lead to harassment by persons with remote interests seeking to intervene as parties.

The definition lists three classes of persons who may become parties: (1) the specifically named person whose rights are being determined in the proceeding; (2) any person entitled as a matter of constitutional or statutory right to participate fully; and (3) any other person allowed by the agency to intervene as a party. The first category will cause little or no difficulty. The second category is so general that court interpretation will be necessary to give it content. The third category is given somewhat more definite content by a provision in Section 10 that agencies may allow any person to intervene as a party who shows that he may be "substantially and specifically affected by the proceeding."

It is doubtful that these definitions will be of much substantive utility. However, one additional and important element should be noted. The agencies are given authority to define further and more specifically those classes of persons who may become parties in particular types of hearings. These regulations must, of course, be consistent with the general specifications of the statute. The important thing for the agencies is that this authority enables them better to systematize the broad categories in each particular type of hearing, so that they will not be harrassed by attempts at intervention by persons with remote interests.

The above provisions relate to full intervention as a party with all of the rights consequent to that status. The agencies are also given authority by Section 10 to allow any other interested person to intervene for a "limited purpose," and they can grant that person whatever participating rights the limited purpose warrants.

§14.12. The conduct of adjudicatory proceedings: Notice and provisions for taking evidence. In Section 11, one of the longest and most important sections of the act, the requirements in regard to the conduct of adjudicatory proceedings are set out. They are minimum requirements of fairness and, of course, do not repeal statutes imposing higher standards in particular cases, or prevent agencies from observing higher standards as a matter of agency discretion.

§14.11. ¹ The inadequacy of definitions of the term "party" is illustrated by the definition in the Federal APA §2(b). The Model State Act contains no definition of the term.

² Authority to make regulations in this area is particularly useful in regard to hearings affecting a broad area of economic life — such as a public utility rate hearing or an insurance rate hearing. Many persons may assert an "interest," though it would serve almost no useful purpose to make them fully participating "parties." A previously established classification of these persons would be a great aid to the agencies in answering recurring questions concerning rights to intervene.
Reasonable notice of the time and place of the hearing must be accorded all parties. Unless so required by some other statute, agencies are not required to follow court rules of evidence, except the rules of privilege. The APA allows the agencies a good deal of leeway in admitting and giving probative effect to evidence, as long as it is the “kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.” The provision is adapted from the Model Act, which uses a similar phrase.¹ Hearsay of various types may therefore be admitted, as well as evidence which might be excluded as irrelevant or incompetent in a court of law. The evidence admitted need only meet this standard of “reliability” expressed in the APA. In practice, the standard is of approximately the same type as that generally applied by administrative agencies and is well known in administrative law.² In fact, leading authorities assert that this standard is the trend in judicial proceedings as well.³

The APA also authorizes agencies to exclude unduly repetitious evidence. All parties are given the right to call and examine witnesses, to cross-examine witnesses who testify, and to submit rebuttal evidence.

§14.13. Documentary evidence and investigation reports. Under Section 11(4) an agency is required to enter in evidence at the hearing all documentary evidence and reports on which it intends to rely in reaching a decision. This is intended to allow the parties to examine such evidence and to give them the opportunity to rebut it. The requirement is aimed primarily at the elimination of the practice in some Massachusetts agencies of obtaining and using confidential investigator’s reports concerning material facts, and at the same time keeping these reports out of the record and unknown to the parties. This method of secret determination certainly is foreign to any notion of fairness.

§14.14. Official notice. The court practice of taking “judicial notice” of certain facts is well known. Perhaps not as well known is the concept of “official notice” whereby administrative agencies take notice of facts concerning which courts would require evidence. The procedure is well established in administrative practice, although its

§14.12. ¹See Section 9(1), “Agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable men in the conduct of their affairs.”

The phrase is based on a statement of Judge Learned Hand in National Labor Relations Board v. Remington Rand, Inc., 94 F.2d 862 (2d Cir. 1938). The phrase used in the Massachusetts APA is actually closer to the language of Judge Hand, whose exact wording was “the kind of evidence on which responsible persons are accustomed to rely in serious affairs.” Id. at 873. The essential meaning of all of the phrases is, of course, the same.

The language of Section 11(2) does not assure, however, that the agency can base its findings solely upon hearsay. See the discussion of this problem in Section 14.24 infra.

²See Davis, Administrative Law 455 et seq. (1951).
³Id. at 450-452; see United States v. United Shoe Machinery Corp., 89 F. Supp. 349 (D. Mass. 1950).
exact contours are difficult to define. Section 11(5) authorizes this practice and describes the matters which may be noticed by agencies, in language borrowed from the Model Act, as follows: "general, technical or scientific facts within their specialized knowledge." An important safeguard is provided in the requirement that all parties be notified of facts noticed and be afforded an opportunity to contest those facts.

§14.15. Tentative decisions: Where necessary. Any attorney or government official acquainted with federal administrative law knows of the still unsettled problems of hearing officers and the separation of the functions of investigation—prosecution and adjudication. These problems are also of primary concern in some states where the hearing officer system is widely used. In Massachusetts, however, hearing officers are infrequently employed. The vast majority of adjudicatory proceedings are held before the entire agency required by law to render the decision or before a single member of the agency. Also, the agency which probably makes more extensive use of hearing officers than any other, the Department of Public Utilities, would to a considerable extent be exempted from a provision modeled after the separation-of-functions provisions of the Federal APA. These facts explain the omission from the Massachusetts APA of any provision for separation of functions.

Another problem which arises only partly out of the use of hearing officers is the extent to which the agency members who render the final decision should personally consider the case and the record before the act. Lawyers who have tried cases before agencies frequently voice the complaint that, while the decision is issued in the name of the agency members, it was in fact made by the hearing officer, or the one agency member who heard the case, or by some staff member. The problem is how to assure maximum consideration by the deciding officials without destroying the institutional processes of the agency. In meeting this problem, the Massachusetts APA borrows heavily from the Model Act.

Section 11(7) provides that, whenever a majority of the officials of an agency who are required to render the final decision have neither heard the evidence, nor read it, the agency must, before rendering a decision adverse to the party, do two things:


§14.15. See Report of the Attorney General's Committee on Administrative Procedure 43-60 (1941); Davis, Administrative Law, c. 10 (1951); Fuchs, The Hearing Examiner Fiasco under the Administrative Procedure Act, 63 Harv. L. Rev. 737 (1950); Draft Report, Committee on Hearing Officers of the President's Conference on Administrative Procedure (1954).

For a comprehensive description of the processes and procedures of the Massachusetts DPU, see Note, 67 Harv. L. Rev. 845 (1954).

Section 5(c) of the Federal APA exempts both rate-making and initial-licensing hearings from its provisions for separation of functions.

§10.
§14.16. Preparation of record and decision. Under Section 11(6), agencies must prepare or have prepared an official record of the hearing, including testimony and exhibits. The agency, however, need not transcribe the testimony unless so requested by a party, and the agency may ordinarily require that the party pay the cost.

Section 11(8) requires that the agency state its decision in writing or as part of the record, and make a statement of the reasoning behind the decision, including a determination of the issues of law and fact involved. When another statute so provides, the agency may delay its preparation of the statement of reasons until it receives a request from a party.

§14.17. Subpoenas. Section 12 of the APA sets out procedures for issuing, vacating, modifying, and enforcing subpoenas in adjudicatory proceedings. The provisions are quite elaborate, and the full details will not be recited here. The most notable provision confers upon all parties the right to issuance of subpoenas without need for agency approval. This is based on the view that the agency is often an adversary party and should not have control over subpoenas. In order to protect witnesses from harassment, however, the section allows any person subpoenaed to petition the agency to vacate or modify the subpoena. In such a case, the agency may do so if it finds that the evidence sought is irrelevant, or that the subpoena is oppressive or was not issued a reasonable time in advance of the hearing.

Any subpoena not vacated by the agency may be enforced by a justice of the Superior Court upon petition of the agency or of the party who requested its issuance. Where the agency vacates or modifies the subpoena, however, no provision is made for immediate court review of its action. The usual doctrine of exhaustion of administrative remedies applies.¹

An effort is made in Section 12 to bring administrative mechanics on subpoenas into as close conformity with civil court practice as is practicable. The form is to be the same if possible. Subpoenas may be issued by a notary public or justice of the peace, as in civil cases, though

¹ See Berger, Exhaustion of Administrative Remedies, 48 Yale L. J. 981 (1939).
they may also be issued by the agencies. The manner of summons and payment of fees should conform to civil practice.

D. Judicial Review

§14.18. General scheme. In the first two parts of the APA, the major objective is the provision of minimum standards of fair procedure. Uniformity is an important but indirect by-product. In the third part, relating to judicial review of administrative decisions, uniformity becomes the dominant aim. The act seeks to achieve this aim in three steps.

§14.19. Right to judicial review. Section 14 provides that any person or "appointing authority" aggrieved by a final decision of any agency in an adjudicatory proceeding is entitled to judicial review, "except so far as any provision of law expressly precludes" such review.

Thus, in a manner similar to that used in Section 13 respecting hearings on licenses, the act resolves legislative silence in favor of judicial review. That this can be significant is illustrated by the impact upon decisions of the Civil Service Commission in disputes between governmental appointing authorities and their employees. Until now, an employee was by statute given the right to seek review of an adverse Commission decision but the appointing authority was not. The general language of Section 14 confers the right to seek review upon both parties.

§14.20. Comprehensive review procedure. The second major step of Section 14 is to provide a comprehensive and self-contained procedure for judicial review of administrative decisions. While the many details need not be discussed here, it can be noted that the section specifies the Superior Court for review, and provides for venue, time for filing a petition for review, contents of the petition, service of copies upon other persons, rights of and procedure for intervention, rights to a stay, and the procedure for certifying the agency record. It makes clear that review will be conducted without a jury and confined to the agency record, although the court is empowered to order the agency to take additional evidence where necessary.

After a comprehensive form of judicial review had been prepared, the draftsmen were faced with the problem of the extent to which this

§14.19. 1 Section 1(4) of the Massachusetts APA defines the term "person" to include all political subdivisions of the Commonwealth. The word "person" is also defined in G.L., c. 7, §7, to include corporations, societies, associations, and partnerships.

2 This term was added by amendment on the floor of the House to make it clear that a governmental agency may obtain review of Civil Service Commission decisions.

3 G.L., c. 31, §§45, 46A.

4 An amendment was made on the floor of the House adding a paragraph at the end of Section 14, which provides in substance that, if the court decides in favor of the employee, he shall be awarded back pay and reasonable costs. Perhaps a better amendment would have been one conferring broad power on the reviewing court to grant money damages in appropriate cases. This would have had the virtue of keeping the act general in application.
form should displace existing law. Obviously, the form should govern where there is no statutory form of review and where the only available review is by an extraordinary writ.

Existing review statutes presented a more difficult problem. Here, the variety of provisions was found to be endless. Different provisions provided for different courts, different times for filing a petition, different rules for grant of a stay, and so on. Moreover, very few of the existing review statutes provided as comprehensive a procedure as does Section 14. Almost all specified the reviewing court, and most contained provisions for standards of review, but beyond these elements no pattern was discernible. One statute might specify a time for filing the petition, while another concerned itself with provisions for stay.

One possible approach would have been to repeal all existing review procedures in favor of Section 14. The obstacle lay in the fact that some — though by no means all — of the existing provisions were justified by special considerations. Thus, unemployment insurance cases are reviewed in the District Court, where the procedure is least costly. On the other hand, utility rate cases are reviewed directly by the Supreme Judicial Court on the theory that they are likely to be important and complex. Similarly, there may be occasion to require a very short time period for filing a review petition, or to prohibit the granting of a stay under any circumstances.

Under these circumstances Section 14 does not displace existing review procedures. Rather, it supplements them. Thus, all existing provisions remain in effect, but with respect to any matter on which the present statute is silent, the provisions of Section 14 govern. Because, as was noted above, most review statutes are not complete, section 14 is likely to have some relevance in almost all cases.

It may be conceded that this solution is not a perfect one. It represents a compromise between conflicting needs for uniformity and diversity. If the Section 14 procedure proves in practice to be sound and workable, then the entire scheme can be considerably improved by a future re-evaluation of existing review statutes to determine whether their unique features are truly necessary, or whether they can be repealed in favor of Section 14. It may also be hoped that the General Court, when devising new review procedures, will utilize Section 14 to a maximum degree.

§14.21. Standards for review. One of the great weaknesses in Massachusetts administrative law has been the great variety of statutory language used in providing standards for judicial review of administrative action. The Supreme Judicial Court has tended to "smooth over" the differences in statutory phraseology, and to develop a fairly uniform standard, but it has been forced, at least linguistically, to express review standards in varying terms. While a review of its decisions does not lead to the conclusion that the Court has more than one clearly defined standard, the variety of statutory and decisional language has made it impossible to build a body of law in this field applicable to agencies generally.
It is in this area that the Massachusetts APA achieves maximum uniformity. This might be called the third and most important step in the new process. In contrast to the approach of supplementing existing review procedures, the APA repeals all standards for review inconsistent with the standards set forth in Section 14 (8), except where a statute provides for court review de novo, i.e., a new court trial. This more ambitious approach was based on the view that the existing variety of phrases had no policy justification and had simply grown "like Topsy" as the various review statutes were written in different years by different draftsmen. A single set of standards should enable the Supreme Judicial Court to develop a unitary body of law with which lawyers can develop a reasonable familiarity.

The standards for judicial review established in Section 14(8) are modeled quite closely on those of the Federal APA and the Model Act. They are sufficiently important to warrant presenting them in full:

(8) The court may affirm the decision of the agency, or remand the matter for further proceedings before the agency; or the court may set aside or modify the decision, or compel any action unlawfully withheld or unreasonably delayed, if it determines that the substantial rights of any party may have been prejudiced because the agency decision is —

(a) In violation of constitutional provisions; or
(b) In excess of the statutory authority or jurisdiction of the agency; or
(c) Based upon an error of law; or
(d) Made upon unlawful procedure; or
(e) Unsupported by substantial evidence; or
(f) Unwarranted by facts found by the court on the record as submitted or as amplified under paragraph (7) of this section, in those instances where the court is constitutionally required to make independent findings of fact; or
(g) Arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.

The court shall make the foregoing determinations upon consideration of the entire record, or such portions of the record as may be cited by the parties. The court shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it . . .

The provisions for review of constitutionality, statutory authority and jurisdiction, procedure, and proper rulings of law are traditional in court review and require no comment here.

Probably most noteworthy is the establishment of the "substantial

§14.21. 1 §9(e).
2 §12(7).

http://lawdigitalcommons.bc.edu/asml/vol1954/iss1/20
evidence” rule in clause (e). While this phrase has not often been used in Massachusetts statutes, the Supreme Judicial Court has applied it in several instances, and in a recent line of decisions has given it content. Moreover, the test is applied in federal court review and is widespread among the states.

It must be recognized, of course, that any standard for review of facts can be formulated only in general terms. Its full import can be made clear solely through elaboration and application by the courts. Nevertheless, in view of the prior Massachusetts decisions applying the substantial evidence test, there is no basis for assuming that it will create a significant change in the general scope of judicial review. On the other hand, its use should eliminate the confusion caused by diversity of language, so that the courts may proceed with their task, already started, of developing a uniform review standard.

Because the term “substantial evidence” was not as familiar in Massachusetts practice as it was elsewhere, the unusual step was taken of inserting a definition of the term in the act. Section 1(6) defines the term as “such evidence as a reasonable mind might accept as adequate to support a conclusion.” In this manner, those who objected that the phrase was too broad and others who thought it too restrictive were satisfied. It should be noted that this language is taken directly from recent Supreme Judicial Court opinions, and thus no change is made in existing law. Moreover, the definition is itself so broad that the problem remains one for the courts. It is fair to say that a truly meaningful definition of “substantial evidence” simply cannot be compressed into statutory form.

Section 14(8)(f) allows the court to remand a case to the agency for further evidence in those cases where the court is constitutionally required to make independent findings of fact. The most frequent occasion of this in recent years has been in public utility rate cases where an issue of “confiscation” is raised. The APA in effect adopts an approach on this matter similar to that adopted in the 1953 amendment to the judicial review statute of the Department of Public Utilities.

§14.22. Supreme Judicial Court: Jurisdiction and rule-making power. Section 15 provides for review of Superior Court decisions under the act in the same manner as in equity suits. The Supreme

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4 See Federal APA §9(e); Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 Sup. Ct. 456, 95 L. Ed. 21 (1951); see also Davis, Administrative Law 914 et seq. (1951).

5 See cases cited in note 3 supra.


7 G.L., c. 25, §5, inserted by Acts of 1953, c. 575.
Judicial Court is given power, however, to vary these equity rules if they fail to provide a "simple, speedy, and effective" review.

Section 16 gives the Supreme Judicial Court a general power to make rules of pleading and practice in regard to judicial review supplementary to and not inconsistent with the act, in accord with the same purpose of a simple, speedy, and effective judicial review of administrative action.

E. OTHER MATTERS OF INTEREST

§14.23. Proposal for reform in extraordinary remedies. As can be seen from the foregoing, the new Massachusetts Administrative Procedure Act applies only to state agencies. This follows the Model State Act and the legislation adopted in a number of states.

However, as originally submitted, the bill on the APA covered local agencies to the extent of three sections providing for a reform of the extraordinary remedies of certiorari and mandamus, the usual avenues of judicial review of local administrative action.1

The proposed reforms would have replaced the present cumbersome and confusing extraordinary remedies2 with a simplified method of judicial review. Either of two review procedures would be used depending on whether or not the administrative hearing was made on a record.3

The Joint Committee on the Judiciary, before which the bill was presented, reported the state APA to the floor without these provisions. The committee recommended that these provisions be placed in the hands of a special commission for study and report at the 1955 session of the Legislature. This recommendation was adopted in substance by the General Court.4

§14.24. Substantial evidence: The "legal residuum" rule. In Sinclair v. Director of Division of Employment Security1 the Supreme Judicial Court examined and applied the phrase "substantial evidence" in review of administrative action. The case assumes considerable importance in view of the adoption in the Massachusetts APA of the "substantial evidence" rule in court review of adjudicatory proceedings.2

In the Sinclair case the findings of fact of the board of review in the Division of Employment Security were considered "conclusive" if sup-

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1 House No. 2766. See Sections 15, 16, and 17 of the draft bill (pp. 20-25 of the bill).
2 For an examination and criticism of these remedies, see Brown, The Use of Extra-ordinary Legal and Equitable Remedies to Review Executive and Administrative Action in Massachusetts, 21 B.U.L. Rev. 632 (1941), 22 id. 52 (1942).
3 For record proceedings see Section 16 of the draft bill, and for nonrecord proceedings Section 17.
4 See Section 14.1 supra, note 4.
ported by "any evidence." The Court had previously held "any evidence" to mean "substantial evidence," which was further held to mean evidence "such as a reasonable mind might accept as adequate to support a conclusion." 4

In the instant case the board denied the employee any employment benefits on the ground that he was guilty of "deliberate misconduct in wilful disregard of the employing unit's interest." The finding was that he had failed to ring up each sale on the cash register, in violation of a company rule. The only evidence to this effect, in the Court's view, was testimony of the company's personnel manager that three different people had reported the employee's misconduct.

The decision of the board was thus based solely on hearsay. The Court held that this would not constitute substantial evidence "even before an administrative tribunal." The holding is not limited to the particular hearsay of the instant case, but appears to represent a broad ruling that hearsay alone is not enough. The Court, nevertheless, did not give any reasons, contenting itself with the citation of one Massachusetts case, 6 a lower federal court case, and a series of decisions of other state courts.

The result reached is not surprising. Many state courts have taken the same view that while administrative agencies may admit hearsay or other judicially incompetent testimony, there must be a "residuum" of competent evidence to support the finding. Yet there are both cases and commentators to the contrary, and the Sinclair case seems to be the first definitive holding on the point in Massachusetts. Hence, one might have expected the Court to discuss the pros and cons of the problem before reaching its conclusion.

In the Sinclair case, the Court did not have to decide a question which has caused difficulty in other states: Must there be sufficient competent evidence to support the decision without regard to hearsay, or may the hearsay testimony be considered a part of the "substantial evidence" when there is some corroborative competent evidence? In New York the latter view became the prevailing one, following the decision in Altschuller v. Bressler. There is some indication that the Supreme Judicial Court will follow this interpretation, in view of its

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*G.L., c. 151A, §42.*

*Maniscalco v. Director of Employment Security, 327 Mass. 211, 97 N.E.2d 639 (1951).*


*Moran v. School Committee of Littleton, 317 Mass. 591, 596, 597, 59 N.E.2d 279, 282 (1945). In this case the Court, by way of dictum, cited with apparent approval decisions of other state courts that hearsay alone is not enough to support a finding.*


*Gellhorn and Byse, id.; see Judge Learned Hand in National Labor Relations Board v. Remington Rand, Inc., 94 F.2d 882, 873 (2d Cir. 1938); Benjamin, Administrative Adjudication in New York 181-194 (1942).*

*289 N.Y. 463, 46 N.E.2d 866 (1943).*
stress in *Sinclair* on the lack of any corroborative evidence, and in the light of a dictum in a prior case.\(^{10}\) The *Altschuler* view seems clearly the better one, for it permits greater though not unlimited flexibility in a court's appraisal of hearsay as substantial evidence. Thus, while in *Sinclair* the issue on the merits involved a serious charge of misconduct, and no explanation was attempted of the failure to call witnesses who could give competent evidence subject to cross-examination, one can imagine cases where the issue would be less personal, the hearsay would have high probative value, and it would be clear that no better evidence was available.\(^{11}\)

The significance of the *Sinclair* decision is fairly obvious. Since the Massachusetts APA adopts the same definition of "substantial evidence" as that used in the *Sinclair* case, there can be no doubt that the decision will be controlling in future interpretation of the new act. Moreover, it is likely that the same result will be reached in review of local agency action under the extraordinary writs.\(^{12}\)

**§14.25. Judicial review of local agency action: Zoning variance appeals.** Another decision attracting considerable attention from the bar is *Pendergast v. Board of Appeals of Barnstable*.\(^1\) In this case, the Supreme Judicial Court, through Chief Justice Qua, interpreted a statutory provision for judicial review of decisions on zoning variances by local boards of appeals. The decision is striking because broad statutory language is construed to permit only a relatively narrow judicial review. In addition, the opinion contains language which may create some confusion as to the scope of review to be applied.

After a board of appeals had denied a variance for a beach house or bath house for commercial purposes in an area zoned for residential purposes, an appeal was taken pursuant to the following statutory provision:

> Any person aggrieved by a decision of the board of appeals, whether or not previously a party to the proceeding, or any municipal officer or board, may appeal to the superior court sitting in equity . . . It shall hear all pertinent evidence and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of such board, or make such other decree as justice and equity may require.\(^2\)

The Supreme Judicial Court noted that both the parties and the judge below had treated the statute as providing for a trial de novo and “giving the court the same power to grant variances that the board


\(^{11}\) The *Altschuler* case, note 9 *supra*, is an excellent example.

\(^{12}\) See the Moran case, note 10 *supra*, cited with approval in Sinclair.
possesses.” This was held to be error. True, the reviewing court must hear all of the evidence anew and make its own findings of fact. “But what is the court to do when it has found the facts?” The Court thus posed the question squarely, but its answer is not as clear as one might like.

One alternative was squarely rejected. The reviewing court may not place itself in the position of the board of appeals. This conclusion has much to commend it. Despite the broad language of the review statute, the Supreme Judicial Court properly avoids a construction which will convert the reviewing court into a super-board of appeals for variances. Indeed, the Court expresses doubt that this result would be constitutional. It is also relevant that zoning variances are a local problem, and the reviewing court is likely to be unfamiliar with local problems. The Court seems entirely justified in requiring that the legislature use more explicit language if its purpose is to eliminate the distinctions between court and administrative agency.

The Supreme Judicial Court also seems to reject the alternative extreme view which would strip the reviewing court of all power to review denials of variances, although this is not as clear as its rejection of the first alternative.

Such doubts as exist derive from the Court’s reasoning concerning the nature of a variance. The Court recites the statutory standards of paragraph 3 of Section 30, under which the board of appeals considers applications for variances; it is obvious that their generality confers on the board a large area of discretion. But then the Court carries the argument a startling step forward: “We do not believe that any person acquires a legal right to a variance by bringing himself within the terms of paragraph ‘3.’” If taken at full face value, this language implies that a board’s denial of a variance can never be unlawful, and thus never reversed, and some members of the bar have informally taken the opinion to mean just that.

This reading, however, seems inconsistent with other language of the opinion: The reviewing court is to determine “what decision the law requires” on the facts which it has found. If, upon those facts, the result reached by the board was within its “administrative discretion,” then the court must affirm. The Supreme Judicial Court notes

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* Ibid.
* The key tests are whether “literal enforcement” of the zoning ordinance would involve “substantial hardship” to the appellant, and whether “desirable relief may be granted without substantial detriment to the public good and without substantially derogating from the intent or purpose” of the zoning ordinance.
* 1954 Mass. Adv. Sh. at 635, 120 N.E.2d at 918. The Court emphasizes this statement by suggesting that paragraph 3 conditions the power of the board to grant, but not its power to deny, a variance, and by concluding that since the paragraph confers only an “opportunity” and not a “right” on the landowner, “if the board of appeals decides against him he commonly has no right enforceable in court.” Ibid.
that it has in the past annulled board decisions which were "not in accordance with law," although court action affirmatively to grant a variance will be sanctioned, if at all, only in the rare case:

We think no one has a legal right to a variance. If a case should come to us in which an owner had been denied a variance solely upon a legally untenable ground and the board should indicate that except for that ground the variance would have been granted, perhaps the court could give relief. But no such case is before us. Neither have we before us a case where the decision of the board is unreasonable, whimsical, capricious, or arbitrary and so illegal. We make no implication as to such a case, if such a case can arise.  

The conclusion is almost anticlimactic. The Court examines the findings made below and states: "There is nothing in them to show that the board was under any legal compulsion to grant the variance. Whether a variance ought to be granted was an administrative question upon which reasonable persons might differ." 9

Thus, the holding of the case, viewed narrowly, is that the board did not act unreasonably; and there is language, albeit tentative in tone, indicating that there is some power of review. The Court does not state that a party denied a variance cannot be a "person aggrieved" under the statute. It seems that, if the board admits that its denial of a variance is based on a ground which it believes relevant but which the court holds irrelevant as a matter of law, the court may act. And one would be most reluctant to assume that, where A and B separately apply for variances and both can bring themselves within the provisions of paragraph 3 in identical manner, the board may grant a variance to A and deny it to B. Yet, if this power of arbitrary discrimination is to be denied the board, the court must have some standard of review.

A denial of any power to review would seem to be squarely inconsistent with the statutory framework. True, the statute merely "authorizes" rather than "commands" the board to grant variances, and this provides some basis for the Supreme Court to invoke the traditional dichotomy between "right" and "privilege." Even the prior cases relating to "privilege" have not denied all review, 10 and whatever their merits they were decided in the absence of a statutory right of review such as was applicable here. The review statute certainly contemplates a modicum of review — why else is the court to hear evidence and make findings?

Although the Supreme Judicial Court does not make the point explicit, it seems to be concerned over the problem of affirmative court action. If the reviewing court orders the grant of a variance, will it

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9 Ibid.
be taking "administrative action"? Of course, even where a court concludes that the board denied a variance on a legally untenable ground, it should not order a grant if a reasonable ground exists on which the variance might be denied. Instead, it should remand the case for reconsideration by the board. If, on the other hand, there is no legally tenable ground to justify denial, it seems entirely consistent with the judicial function for the court to order that the variance be issued.

If the Pendergast case be interpreted to provide some measure of review, there still remains the question of a proper standard. While at one point the opinion suggests that the test will simply be the "reasonableness" of the board's action, there are many other indications that this term will be construed very narrowly indeed. It seems clear that the scope of review will not be broader than what was formerly available under the extraordinary writs, and possibly it will be narrower.

Court review of local action under the extraordinary writs, especially in matters of "privilege," has traditionally been narrow in scope, although not with uniform consistency. The review statute here applicable, however, appears to contemplate a somewhat broader scope of review than was available in the past under the extraordinary writs. It is not very helpful to assert that there is no "legal right" to a variance; the counterassertion is that there is a "legal right" to judicial review conferred by the statute. It seems more useful simply to declare that the board must act in a rational manner, recognizing that the statute permits the board to weigh many intangible factors so that the area of permissible decision is very wide.

The decision has no direct effect on the Massachusetts APA, since that act applies only to state agencies, and its indirect effect is minimal, since the act does not affect the scope of review where review is de novo. It is noteworthy, however, that the provisions proposed in the original draft of the bill to replace certiorari and mandamus — which, as noted in Section 14.23 supra, were not enacted — set up a procedure comparable to that in the Pendergast case. Under those provisions, where the agency hearing was not of record, the court would hear all of the evidence, and then test the agency decision to see whether it was in accordance with law and was supported by "substantial evidence." In a case such as Pendergast, the court would consider whether there was substantial evidence to support a board finding, for example, of no "substantial hardship," but the court would not make its own finding whether there was "substantial hardship." One difficulty with this form of review lies in the fact that the board makes no explicit findings.

11 See Scudder v. Selectmen of Sandwich, note 10 supra.
13 In the Chamberland case, note 10 supra, the Court interpreted a statute authorizing the issuance of a decree "as law and justice may require" as calling for an order to grant a license where the petitioner was undoubtedly entitled to it.
14 Compare the discussion of a similar problem under a differently worded but analogous New York statute in Benjamin, Administrative Adjudication in New York 351-359 (1942).
and the court is forced to assume that the board made all of the findings consistent with its decision. The draft of the bill sought to overcome this difficulty by requiring the agency to give a statement of the reasons for its decision in the pleadings. A similar procedure can presumably be followed under Section 30.

It remains to be seen what effect the Court will give in the future to the opinion in the Pendergast case. Certainly it constitutes a warning to draftsmen that only clear and explicit statutory language will succeed in sweeping away long-established policies in regard to judicial review. In retrospect, it is apparent that, if the draftsmen of Section 30 desired to insure review, they might have fared better had they made the variance provision mandatory in form, required the board to state the reasons for its decisions along with its findings, and explicitly empowered the court to review the reasonableness of the agency determination.